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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM JOSEPH CARROLL, Defendant and Appellant.	G055898 (Super. Ct. No. 14HF0031) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted William Joseph Carroll of murder (Pen. Code, § 187; all statutory references are to the Penal Code unless otherwise noted) in a drunk driving incident that killed a woman. Carroll contends the trial court erred in refusing to instruct the jury with a pinpoint jury instruction on implied malice and with an instruction on the lesser offense of gross vehicular manslaughter while intoxicated. Finding no error, we affirm.

I

BACKGROUND

A. *The Incident*

Shortly before 11:40 p.m., Carroll stopped his Ford truck in the left-turn lane on El Toro Road, waiting for a green light. He intended to turn into the southbound lane on Santa Margarita Parkway. A raised median separates Santa Margarita Parkway's northbound and southbound lanes. Carroll turned left into the wrong lane. He was on the wrong side of the median in a northbound lane as he headed south on Santa Margarita.

After cresting a hill on Santa Margarita, Carroll's truck collided head-on with an oncoming minivan. Both vehicles were traveling "around" the speed limit of 50 miles per hour. Taken together, these approaching vehicles reached a closing speed of about 101 miles per hour or 150 feet per second. Ana Martinez, the sole occupant in the minivan died of her resulting injuries.

A blood test administered at the hospital about two hours after the collision showed Carroll had a 0.239 percent blood-alcohol concentration (BAC). Given his weight, BAC at the time of the blood draw, and the standard elimination rate the body metabolizes alcohol, Carroll's estimated BAC at the time of the collision was between 0.25 percent and 0.26 percent. That equates to 12 to 14 drinks in Carroll's system.

B. *Carroll's Prior Drunk Driving Offense*

This was not Carroll's first drunk driving offense. In 2008, Carroll pleaded guilty to one count of driving under the influence of alcohol or drugs (Veh. Code,

§ 23152, subd. (a)) and one count of driving with blood alcohol of 0.08 percent or more (Veh. Code, § 23152, subd. (b)), for which he received three years of informal probation. In his guilty plea form, Carroll initialed an advisement stating "it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I continue to drive while under the influence of alcohol or drugs or both, and as a result of that driving someone is killed, I can be charged with murder."

C. *The Trial*

The information charged Carroll with one count of murder (§ 187). The pleading tracked the offense's statutory language; it did not provide any factual detail about the alleged offense. The prosecution tried the case on a theory of implied malice murder, asserting Carroll demonstrated malice by driving while intoxicated and with conscious disregard of the danger to human life.

The defense made essentially two points. First, the defense sought to prove Carroll's conduct did not meet the legal standard for implied malice because driving while intoxicated has a low probability of causing the death of another. Through cross-examination of the testifying officers, the defense elicited evidence there was a low incidence of fatalities in driving under the influence (DUI) investigations;[1] hence, drunk driving is not dangerous to human life under the elements of implied malice.

Second, the defense sought to prove the intersection itself where Carroll made his fateful left turn posed the real danger on the night of the incident. The defense presented evidence the traffic signs were incorrectly positioned at the intersection; the "keep right" sign and the yellow diamond sign were too low and were not angled

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[1] Officer Eggert testified that, out of the 75 collisions he had investigated involving intoxicated driving, about four included fatalities. Officer Poythress testified that he had investigated about 30 or more DUI incidents, but only this single case involved a fatality. Officer Matranga testified that, out of the "[a]t least 150" DUI accidents he had investigated, "[m]aybe 10" involved fatalities. Officer Stewart testified that two or three of his "[c]ouple hundred" DUI investigations involved fatalities.

correctly toward drivers in the left-turn pocket which suggested it caused Carroll to turn into a lane on the wrong side of the median. A traffic-engineer witness testified these incorrectly positioned signs were less visible to drivers, particularly at night, and made the intersection "quite confusing."

D. *The Rejected Jury Instructions*

The trial court declined to give Carroll's two proposed instructions. The first of these was a pinpoint instruction on implied malice, which Carroll argued was needed to clarify the pattern instruction for murder (CALCRIM No. 520) the trial court gave at trial.

Using CALCRIM No. 520, the trial court instructed the jury on the two elements of the charged crime as follows: "Number one, the defendant committed an act that caused the death of another person. And, two, when the defendant acted, he had a state of mind called malice aforethought." The instruction continued, in pertinent part, that the "defendant acted with implied malice if: number one, he intentionally committed an act. Two, the natural and probable consequences of the act were dangerous to human life. Three, at the time he acted, he knew his act was dangerous to human life. And, four, he deliberately acted with conscious disregard for human life."

The instruction also explained that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. The death of another must be foreseeable. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."[2]

To "clarify" the "natural and probable consequences" element of the implied-malice definition, Carroll requested the following special instruction: "To find that the natural and probable consequences of the defendant's act were dangerous to

[2] The sentence about foreseeability was added to the pattern instruction at Carroll's request without objection.

human life, the prosecution must prove that there was a high probability that the defendant's act would result in death. Serious bodily injury or harm is not enough."

The trial court refused to give the requested pinpoint instruction, ruling the language of CALCRIM No. 520 was sufficient.

The second requested instruction concerned a purported lesser included offense. Carroll asked the trial court to instruct the jury on gross vehicular manslaughter while intoxicated (§ 191.5), arguing it was a lesser included offense of the charged crime based on the "expanded accusatory pleading test" adopted in *People v. Ortega* (2015) 240 Cal.App.4th 956, 967 (*Ortega*). Defense counsel argued, given the preliminary hearing testimony, Carroll could not have committed the charged implied malice murder without also committing gross vehicular manslaughter while intoxicated. The trial court rejected the argument and refused the instruction.

A jury found Carroll guilty of the charged offense. The trial court imposed a prison term of 15 years to life.

II

DISCUSSION

A. *The Trial Court Did Not Err in Rejecting the Pinpoint Instruction on Implied Malice*

Carroll argues the trial court erred in denying his request to instruct the jury that second degree murder requires an act with "a high probability" of causing the death of another. He contends the requested instruction "correctly amplified the given instruction that murder requires an act 'the natural and probable consequences of [which] were dangerous to human life[.]'" Carroll further contends the requested pinpoint instruction directly related to his defense there was only a low probability his intoxicated driving would lead to death; consequently, the court prejudicially erred by omitting this instruction. We disagree. The trial court had no duty to "amplify[y]" CALCRIM No. 520, an instruction the California Supreme Court specifically approved in *People v. Knoller* (2007) 41 Cal.4th 139, 152 (*Knoller*).

An appellate court reviews jury instructions de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217.) "[A] trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative or potentially confusing." (*People v. Moon* (2005) 37 Cal.4th 1, 30 (*Moon*).)

In *Knoller*, *supra*, 41 Cal.4th at p. 143, the Supreme Court "reaffirm[ed] the test of implied malice" as articulated in *People v. Phillips* (1966) 64 Cal.2d 574 (*Phillips*) and known as "the *Phillips* test." Quoting the *Phillips* decision, the high court stated, "Malice is implied when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' ([*Phillips*], *supra*, at p. 587.)" (*Knoller*, *supra*, 41 Cal.4th at p. 143.)

The *Knoller* opinion noted the existence of an alternative articulation of implied malice, derived from Justice Traynor's concurring opinion in *People v. Thomas* (1953) 41 Cal.2d 470, 480 (*Thomas*), a case predating *Phillips*. Under this alternative articulation known as "the *Thomas* test," malice is implied when "'the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.'" (*Knoller*, *supra*, 41 Cal.4th at p. 152.)

The Supreme Court explained it made a choice between these two competing articulations of implied malice in *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221. The high court explained that, despite the fact "these two definitions of implied malice in essence articulated the same standard[,]" it held in *Dellinger* "'the better practice in the future is to charge juries solely in the straightforward language of the "conscious disregard for human life" definition of implied malice,' the definition articulated in the *Phillips* test. [Citation.] The standard jury instructions thereafter did

so. (See CALJIC No. 8.11 and CALCRIM No. 520.)" (*Knoller*, *supra*, 41 Cal.4th at p. 152.)[3]

Although the trial court here complied with the Supreme Court's directive in *Knoller* to instruct the jury with the *Phillips* test for implied malice (i.e., CALCRIM No. 520), Carroll argues the instruction was insufficient. Carroll argues "the jury should have been instructed that second-degree murder requires an act with 'a high probability' of causing death." Carroll contends the "high probability" language from the *Thomas* test "is still a valid and clear way to explain the degree of risk needed for an act to qualify for murder." He argues the *Thomas* test's "'high probability' language . . . remains good law."

Carroll's argument lacks merit. Though he correctly asserts the Supreme Court did not invalidate the *Thomas* test and its "objective standard" for the type of act required for implied malice (i.e, an act with a "high probability" of causing death), his argument ignores a crucial fact: The Supreme Court in *Knoller*, *supra*, 41 Cal.4th at p. 143 specifically approved the *Phillips* test (CALCRIM No. 520) as a jury instruction for implied malice. Though the "high probability" language of the *Thomas* test remains

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[3] Both articulations of implied malice were discussed at length in *Knoller* because the trial court improperly used language from the *Thomas* test in ruling on a new trial motion. In *Knoller*, the defendant was convicted by jury of second degree murder after being "properly instructed . . . in accordance with the *Phillips* test[.]" (*Knoller*, *supra*, 41 Cal.4th at p. 157.) Later, however, the trial court erroneously used "an incorrect test of implied malice" in granting the defendant's motion for new trial. (*Id.* at p. 143.) In what the Supreme Court described as a misapplication of "language from the *Thomas* test," the trial court granted the new trial motion based on its finding the defendant had not *known* "'there was a *high probability*' that her conduct would result in someone's death." (*Id.* at p. 157.) In other words, the trial court required proof the defendant had a *subjective awareness* her conduct had a high probability of death when neither the *Phillips* test nor the *Thomas* test had a *subjective* requirement. (*Id.* at p. 157.) Consequently, the Supreme Court concluded, the trial court misapplied the implied malice test and erred in granting the new trial motion. "[I]mplied malice requires a defendant's awareness of engaging in conduct that endangers the life of another — no more, and no less." (*Id.* at p. 143.)

"good law," the Supreme Court ruled in *Knoller* that the *Phillips* test is the preferred formula. Consequently, Carroll cannot persuade us the trial court erred in relying on the *Phillips* test to instruct the jury.

B. *The Trial Court Properly Refused to Instruct the Jury on Gross Vehicular Manslaughter While Intoxicated*

Carroll argues the trial court erred in failing to instruct on gross vehicular manslaughter while intoxicated (gross vehicular manslaughter) as a lesser included offense of second degree murder. Carroll's argument relies on an "expanded accusatory pleading" test for lesser included offenses adopted by *Ortega, supra,* 240 Cal.App.4th at p. 967. But *Ortega's* test conflicts with the California Supreme Court's decision in *People v. Montoya* (2004) 33 Cal.4th 1031 (*Montoya*). Consequently, we decline to follow *Ortega*. We find no merit in Carroll's argument gross vehicular manslaughter is a lesser included offense on which the trial court had a duty to instruct.

1. Applicable Legal Principles

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A court must instruct on a lesser offense "whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id*. at p. 162.)

Trial courts employ "two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to

see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*Moon, supra,* 37 Cal.4th at p. 25-26.)

We review de novo the trial court's failure to instruct on an assertedly lesser included offense, viewing the evidence in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

2. There Was No Duty to Instruct on Gross Vehicular Manslaughter

The information pleaded only the elements of the offense: that Carroll "in violation of Section 187 (a) of the Penal Code . . . did unlawfully and with malice aforethought kill . . . a human being." Carroll concedes gross vehicular manslaughter is not a lesser included offense of murder under the elements test because it requires additional elements (use of a vehicle, intoxication) not required for murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988-989, disagreed with on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.) Nonetheless, Carroll argues it is a lesser included offense based on the preliminary hearing transcript, which supplies the missing elements. We reject this so-called "expanded accusatory pleading" test as inconsistent with the Supreme Court's decision in *Montoya, supra,* 33 Cal.4th at p. 1036.

Carroll urges us to adopt the "expanded accusatory pleading test" articulated in *Ortega, supra,* 240 Cal.App.4th at p. 967. The defendant in *Ortega* was charged with forcible sexual penetration (§ 289, subd. (a)(1)(A)) based on evidence of digital penetration. (*Ortega, supra,* 240 Cal.App.4th at pp. 960-961.) He argued the trial court had a duty to instruct jurors that sexual battery was a lesser included offense of forcible sexual penetration. The appellate court agreed, concluding that although it was not a lesser included offense under the elements test, it qualified as a lesser included

offense under "an expanded accusatory pleading test." (*Id.* at p. 967.) The court reasoned that "evidence adduced at the preliminary hearing must be considered in applying the accusatory pleading test when the specific conduct supporting a holding order establishes that the charged offense necessarily encompasses a lesser offense." (*Ibid.*) The court believed this rule flowed naturally from a criminal defendant's due process right to be prosecuted only on the noticed charges. (*Id.* at pp. 968-969.)

The Attorney General contends *Ortega* was wrongly decided. We agree. The Attorney General aptly points out *Ortega*'s advocacy of an "expanded accusatory pleading" test directly conflicts with the holding in *Montoya*, *supra*, 33 Cal.4th at p. 1036, that "[c]onsistent with the primary function of the accusatory pleading test — to determine whether a defendant is entitled to instruction on a lesser uncharged offense — we consider *only* the pleading for the greater offense." (*Ibid*.)

The *Montoya* court specifically disapproved *People v. Rush* (1993) 16 Cal.App.4th 20, which considered evidence at the preliminary hearing in applying the accusatory pleading test. (*Montoya*, *supra*, 33 Cal.4th at p. 1036, fn. 4.) Moreover, later Supreme Court cases have reiterated that "[t]he trial court need only examine the accusatory pleading" in applying the accusatory pleading test. (*People v. Smith* (2013) 57 Cal.4th 232, 244; see *People v. Banks* (2014) 59 Cal.4th 1113, 1160.)

After Carroll filed his opening brief, a new published case relied on *Montoya* to reject Ortega's "expanded accusatory pleading test." In *People v. Macias* (2018) 26 Cal.App.5th 957 (*Macias*), a defendant was charged with and convicted of using a minor to pose for sexual conduct (§ 311.4, subd. (c)) based on evidence he secretly had filmed his partner's daughter in the bathroom and her bedroom. The defendant claimed the trial court should have instructed the jury that unauthorized invasion of privacy was a lesser included offense under *Ortega's* "expanded accusatory pleading" test. (*Macias, supra,* 26 Cal.App.5th at p. 961.) The appellate court rejected *Ortega*'s test as "contrary to *Montoya*" — a case *Ortega* failed to cite. (*Id.* at p. 964.)

We note Carroll, likewise, failed to discuss *Montoya* in his opening brief, but addresses *Montoya* in his reply brief. There, he attempts to distinguish *Montoya* as a multiple conviction case, i.e., a case where a defendant is charged with and convicted of both the greater and lesser offenses. Carroll argues, "*Montoya's* comments about the accusatory-pleading test were made in a context that is materially different than the context here" because, in a multiple conviction case "the elements test controls." Consequently, Carroll asserts, the high court's discussion of the accusatory pleading test in *Montoya* was dicta.

We disagree with Carroll's narrow reading of *Montoya*. The high court articulated the general standard for the accusatory pleading test before considering its application in a multiple conviction case. (*Montoya*, *supra*, 33 Cal.4th at pp. 1035-1036.) It follows that *Montoya* intended its rule to apply broadly, not only in the context of multiple convictions, but also in the context of determining whether instructions on a lesser offense were warranted.

As for *Macias*, *supra*, 26 Cal.App.5th 957, Carroll makes no real effort to address it. Instead, he merely argues "cases following *Montoya* for how to apply the accusatory-pleading test in the uncharged-offense context (including [*Macias*] . . .) are misguided."[4] Again, we disagree. It is the *Ortega* case and its embrace of an expanded accusatory pleading test that is misguided.

We conclude the trial court did not err in refusing to instruct the jury on gross vehicular manslaughter.

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[4] We note two recently published cases have also refused to follow *Ortega, supra,* 240 Cal.App.4th 956 on the ground it conflicts with the Supreme Court's ruling in *Montoya*, *supra*, 33 Cal.4th at p. 1036. (See *People v. Alvarez* (2019) 32 Cal.App.5th 781, 787-789; see also *People v. Munoz* (2019) 31 Cal.App.5th 143, 158.)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.